United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2104

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NAPOLEON C. GABRIEL, JACOB R. COHEN and JUNE COHEN, and MICHAEL MOUMOUSIS,

74-2104

Objectants-Appellants,

-against-

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

and

MISSISSIPPI RIVER CORPORATION et al,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR GABRIEL AND MOUMOUSIS, APPELLANTS

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Brief for
Gabriel and Moumousis,
Appellants

STATEMENT

Appellant Gabriel, on behalf of himself and others similarly situated, is appealing from a judgment of the United States Federal District Court, Southern District of New York, rendered July 3, 1974, and from all prior orders and decisions of said court upon which said judgment was based, including, in particular, the denial by the Court below on April 8, 1974, of Gabriel's motion, dated February 22, 1974, to be relieved of the District Court's judgment of May 2, 1973, approving the settlement of the class suit below.

Appellant Moumousis is appealing on behalf of himself and others similarly situate from a denial by the same District Court below on December 7, 1973, of his motion to be relieved from the said District Court's judgment of May 2, 1973, approving the settlement of the Class Action below.

FACTS

Appellants, at all times mentioned, were stockholders of Class B Stock in Missouri Pacific Railroad Company, (MoPac), (Gabriel owning 5 shares; Moumousis, 2 shares).

Of the approximate 1200 persons owning Class B Stock of Mo Pac, 922 of them, or 76.1% of such stockholders owned 10 shares or less.

Alleghany Corporation (plaintiff intervenor appellee) was the beneficial owner of the majority of Class B Stock--21,243 shares out of the 39,731 shares of B outstanding.

Of the two types of stock issued by Mo Pac, the Class B stock was more valuable than Class A, because Class B stock represented the equity in Mo Pac, while Class A was limited to non-cumulative dividends of $5.00 per year, and on dissolution, the first $100 and no more.

The action below was commenced in December, 1967, by Betty Levin, a Class B Mo Pac Stockholder, against Mo Pac, Mississippi River Corporation (the principal holder of Class A stock of Mo Pac), and individual officers. Thereafter, Alleghany and Robert Le Vasseur, as owners of Class B Mo Pac stock intervened by leave of the Court on the side of Plaintiff Levin.

The jurisdiction of the Court was based in all of the complaints, despite the statements of the Court below to the contrary, was solely diversity of citizenship. (even item 115 of the record, Alleghany's supplemental amended complaint, allegation 3, page 2, July 20, 1972).

The thrust of all of the complaints constituted claims for better dividend payments to the plaintiffs, as Class B stockholders, by the defendants.

On October 9, 1968, by order of Judge Van Pelt Bryan, the actions of Levin, Alleghany and Le Vasseur were made into a class action for themselves and all other Class B stockholders (item 48 of the record on appeal).

From October, 1968, until mid-year 1972, when the case was referred to Mr. Justice Weinfeld, nothing much developed other than pre-trial examinations and maneuvers, and the amended supplemental complaint of Alleghany (supra, July 20, 1972).

On December 18, 1972, the class party plaintiffs entered into a settlement agreement with the defendants, which provided for abandonment of Plaintiffs' claim, and a complete recapitalization of Mo Pac. By the terms of the agreement, the value of each share of Class B stock was set at $2450.00, without any provision for dissenters to have a right of evaluation, and the equity of Class B stockholders in Mo Pac was reduced from 65.5% to 25.5%, the benefit of the difference going to the defendants, Class A holders of the action.

On March 19, 1973, Mr. Justice Weinfeld approved the settlement agreement by opinion (item 199 of the record below; 59 F.R.D.353).

The settlement agreement and the subsequent approval and judgment of the Court provided among other things the following:

a) The value of Class B stock to be approximately $2450 per share--a value which the Court clearly indicated was based, not on actual value, but the "balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate to the Class B stockholders and Mo Pac". (59 F R D 353, p361).

b) approval by 75% of the stockholders of each class of Mo Pac.

c) approval by the Inter-State Commerce Commission.

d) Subject to the District Court's approval, payment of fees to the attorneys for the plaintiffs by Mississippi and Mo Pac in the event the agreement was approved and after final judgment is no longer subject to appeal (section 7.10 of the settlement agreement; 59 F R D 353, p 357 and 373).

e) That if the closing contemplated by Section 6.1 of the Agreement did not take place by December 31, 1973, the agreement may be terminated (7.7 Settlement Agreement).

No provision was made for dissident Class B Stockholders to have their stock evaluated for its true value, and under Missouri law, no such right existed.

On July 15, 1973, at a meeting of the stockholders of Mo Pac, the settlement agreement was approved by the agreed vote, the appellants and many other Class B stockholders voting against approval.

Subsequently, the I.C.C., prior to December 31, 1973, approved the plan of recapitalization over the protest of many dissenting Class B Stockholders.

Four appeals from the said I C C determination, by dissident Class B Stockholders, are now pending in the Federal District Courts (3 in N.J.; 1 in Missouri), and are yet to be determined.

In addition to the above mentioned appeals, Moumousis filed an appeal on January 2, 1974, from the denial of his motion to the court below on December 7, 1973, and Gabriel filed a notice of appeal on June 18 (item 223 of Record) from an order of April 8 denying Gabriel's motion.

Despite these pending appeals from the I C C determination and from Moumousis' and Gabriel's motions, and despite the fact that the legality of the settlement of the action below was still in doubt, and contrary to the agreement of settlement and the judgment of the Court below reserving the right to fix plaintiffs' attorneys' fees until appeals were resolved, the Court below, on June 26, 1974, rendered an opinion granting said attorneys' fees (item 224 of the record) and judgment in accord with the opinion

More than anticipating the final determination of the litigation, the Court below awarded compensation to the attorneys for Levin and LeVasseur in the amount of $1,750,000 plus $22,422 for expenses, which compensation covered services rendered in an entirely different and prior case that was already completed before the commencement of the case below. (Levin v Mississippi River Fuel Corp 286 U.S. 162 19670. Compensation for such work was never mentioned in the settlement agreement or the opinion and judgment approving the settlement, nor in the proxy statement presented to Mo Pac's stockholders for their approval.

POINT I

THE JUDGMENT OF JULY 3, 1974, AWARDING FEES TO PLAINTIFFS' ATTORNEYS IN THE AMOUNTS OF $850,000 AND $1,750,000 PLUS $22,422.00 IN EXPENSES WAS IN ERROR IN THAT A) IT WAS PREMATURE BECAUSE VIABLE APPEALS WERE PENDING AND THE SETTLEMENT AGREEMENT PLUS THE JUDGMENT OF MAY 2, 1973, CONTEMPLATED NO SUCH PAYMENTS UNTIL THE POSSIBILITY OF APPEAL WAS OVER; AND B) BECAUSE IT AWARDED COMPENSATION TO THE FIRM OF ORANS, ELSEN AND POLSTAIN FOR LEGAL WORK ALLEGED TO HAVE BEEN PERFORMED IN AN ENTIRELY DIFFERENT AND PRIOR CASE TO THE ONE BELOW.

(a) By the settlement agreement section 7.10, approved by the Court, plaintiffs' counsel will apply to the Court for allowances of fees and expenses "after such final judgment is no longer subject to appeal".

Appellants and many other Class B Stockholders have been resisting the judgment of July 3, 1974, and at present there are pending 4 appeals from the I C C approval of the settlement, all of which involve the validity of the July 3, 1974, judgment, not to mention the present appeal.

The judgment of July 3, 1974, could not be final, because it was conditioned on approval by the stockholders, I. C. C., closing by December 31, 1973, and the very underlying assumption that the agreement of settlement and the judgment of the Court was legal and correct.

(b) In a prior litigation of Levin v. Mississippi River Fuel Corp. 386 U.S. 162, 170 (1967), the firm of Orans, Elsen and Polstein claimed to have rendered legal service, and for which they sought reimbursement in the instant case (Item 216 of Record).

The Court below awarded compensation for such services even though the case was different, and the parties involved in the two cases were not shown to be the same.

Neither the settlement agreement, the opinion and judgment of the Court (May 2, 1973), nor the proxy statement presented to the Stockholders of Mo Pac ever indicated an understanding or an intent that said attorneys were to be compensated in this for services in a case which was prior to and concluded before this case began.

Because such an award was outside the settlement agreement, opinion and proxy statement, the Court lacked

jurisdiction to award in a class action compensation for services in another suit.

POINT II

THE JUDGMENT BELOW WAS IN ERROR BECAUSE THE JURISDICTION OF THE ACTION, BEING BASED ON DIVERSITY OF CITIZENSHIP ALONE, AND 76.1% OF THE TOTAL CLASS B MO PAC STOCKHOLDERS, OWNING 10 OR LESS SHARES A PERSON, COULD NOT MEET THE INDIVIDUAL JURISDICTIONAL AMOUNT OF $10,000, THE COURT LACKED JURISDICTION TO BIND SUCH STOCKHOLDERS, AND TO AWARD FEES ON THE BASIS THAT THE ATTORNEYS WERE OF SERVICES TO THESE NON-PARTIES.

These appellants own 5 and 2 shares respectively of Mo Pac Class B stock, and could not have had the amount of $10,000 involved in the litigation below for better dividends.

Despite all statements to the contrary by the Court below, a review of the complaints and supplemental complaints show that the jurisdiction of the plaintiffs below was based solely on Diversity of Citizenship.

Even the amended supplemental complaint of Intervenor Alleghany Corporation filed July 20, 1972, four years after the action was declared a class action, and five months before the settlement agreement still alleged that jurisdiction was based on diversity (paragraph 3, item 115 of Record).

No claim was ever made that jurisdiction was based on Section 10 (b) of the Securities Exchange Act of 1934. The first mention of this was in paragraph 48 of the Alleghany amended complaint. And the Court, in its opinion of May 2, 1973, approving the settlement agreement stated "it is interesting to note that plaintiffs do not seek separate relief 10b-5 claim; instead, they urge that the damages be measured by the amount of reasonable dividends allegedly withheld by the defendants during 1964-1971" (59 FRD 353;365).

Indeed, if such a change of the base of jurisdiction was attempted four years after the action was declared a class action, it is submitted that those to be represented should have been notified under F.R.C.P.23.

At any rate, it is a mystery as what the Court below based its claim that jurisdiction was based on 10b of the S E C, October of 1934, which requires no jurisdictional amount.

Appellants rely on Zahn v. International Paper Co. 42 U. S. L. W. 4087 (U.S. Dec. 17, 1973) affirming the opinion of this Circuit that in a spurious class suit, such as this, wherein jurisdiction is based on diversity of citizenship, each and every member of the class must have at stake in the contraversy the $10,000 jurisdictional amount. Obviously in a suit for better dividends, these appellants had no such amount in contraversy.

POINT III

THE COURT BELOW LACKED ADJUDICATORY POWER IN APPROVING THE SETTLEMENT, BECAUSE THE SETTLEMENT IN REQUIRING RECAPITALIZATION WENT FAR BEYOND THE ISSUES IN LITIGATION, AND REQUIRED THE TAKING OF APPELLANTS PROPERTY, WHICH WAS NOT IN JEOPARDY, NOR UNDER THE AUTHORITY OF THE PLAINTIFFS' REPRESENTATIVES, WITHOUT DUE PROCESS OF LAW.

The suit below was for better dividends for Class B Stockholders. No cause of action existed for recapitalization. This was not in issue.

Appellants' right to their Class B Stock was not in jeopardy--the case could be won or lost without effecting their stock representing 65.5% of equity in Mo Pac.

Those plaintiffs who represent a class have a trust to pursue the claim or settle within the issues raised.

The plaintiffs appellees abandoned this trust and entered an agreement for recapitalization of Mo Pac, a result so unexpected and so far removed from the pleadings that it makes every property owner feel insecure. Moreover, the plaintiffs appellees set the value of appellants' stock without providing them the right of independent legal evaluation.

The only way the recapitalization of Mo Pac could be effected was by corralling the appellants and reaching into their pockets to make them pay--their equity was reduced from 65.5% to 25.5%, the difference going to the Class A defendants.

There is something very wrong here, and what it is is simply that, in the settlement of a spurious class suit, the settlement must have some reasonable relationship to the issues in litigation, and not be absolutely alien to the suit.

POINT IV

ALLEGHANY, ALTHOUGH IT WAS THE OWNER OF 53% OF MO PAC CLASS B STOCK, WAS NOT REPRESENTATIVE OF APPELLANTS, AND IT WAS IN ALLEGHANY'S INTEREST TO DIVEST ITSELF OF ITS CLASS B STOCK, SAID STOCK BEING UNDER THE JURISDICTION OF THE I C C.

Mr. Moumousis' motion, argued December 4, 1973, brings out the facts on Alleghany's acquisition of the Jones Motor Co., Inc., started as early as September 4, 1968, and consummation of the proposal that the trusteeship of Alleghany's Mo Pac securities "be continued subject to the continuing jurisdiction of the Commission". (Alleghany Corporation Control and Purchase of Jones Motor Co., Inc.--and Control Erie Trucking Company No. M.C.-F-10444, 109 Mcc 331,350, decided January 27, 1970)

On October 6, 1973, Alleghany, through its attorney M. Lauck Dalton, filed a brief with the ICC urging the ICC to approve the recapitalization of Mo Pac as approved by the Court below. The argument advanced is that the transfer of Alleghany's Class B stock would be in keeping with the public interest, the prior order of the ICC (Jones Motor Co., Inc. 109 MCC 333) and would save

Alleghany from great financial injury, and relieve the ICC of the burden of the supervision of the trust of the Alleghany Mo Pac stock.

The Court below placed great weight on Alleghany's desire to enter the settlement calling for Mo Pac recapitalization and its sale of its B stock. (P32,31 opinion May 2, 1973.)

Moreover, Alleghany's tax shelter is far better than any the individual Class B Stockholders could ever have. The $850 cash per share of Class B under the terms of the settlement must be treated as ordinary income and can be disasterous to some of the individual stockholders of Class B who are in a high tax bracket.

POINT V

THIS COURT SHOULD REVERSE THE JUDGMENT AND SETTLEMENT BELOW BECAUSE FORTUNATELY A JUST, INTELLIGENT AND LEGAL SOLUTION DOES EXIST ACCOMMODATING THE CONFLICTING INTERESTS OF THE PARTY BELOW WITHOUT ABUSING THE INTENT OF RULE 23(b) (F.R.C.P.), ALLOWING ALLEGHANY TO DISPOSE OF ITS B STOCK, ALLOWING MISSISSIPPI TO HAVE VOTING CONTROL, AND PRESERVING TO APPELLANTS THEIR EQUITY AND PROPERTY RIGHTS IN THEIR STOCK AS PROVIDED UNDER THE APPROVED REORGANIZATION OF MO PAC IN 1956.

All the above can be attained as follows:

(1) Alleghany should be permitted to dispose of its B Stock in bulk at $2,450 per share,(the price agreed to below), by selling such stock to Mo Pac, the said shares becoming treasury stock.

(2) The Class B Stock should be split 20 for 1, leaving the A stock alone.

The result of the above would be to give Mississippi 51.8% voting control, and the minority Shareholders of the Class A and B Common, 48.2% voting power.

This solution is ideal in that it allows for the accomplishment of the legitimate goals of the corporate parties without abusing the property rights of appellant and other small Class B Stockholders, (viz. the reduction of their equity from 65.5% to 25.5%), and the exposure of said Class B Stockholders to unnecessary tax loss.

Moreover, such a plan maintains the plan of the approved Mo Pac reorganization of 1956. (Missouri Pac. R.R. Reorganization 290 I.C.C. 477 (1954), app. in In Re Missouri Pac. R.R., 129 F. Supp. 392 (E.D.Mo.), aff'd sub non. Missouri Pac. R.R. 5¼% S.S.B.C. v. Thompson 225 F.2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959 (1956).

CONCLUSION

For the reasons set forth above, the undersigned requests that (a) the judgment or fees be set aside; (b) the judgment of May 2, 1973, and the settlement agreement approved therein be reversed; and (c) the case remanded to the Court below for settlement in accord with point V supra, or for trial or dismissal.

Respectfully submitted,

Dated: Brooklyn, New York
October 4, 1974

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Affidavit of Mailing

STATE OF NEW YORK

COUNTY OF New York

Gerard M. Carey, being duly sworn, deposes and says that he is the attorney for the appellants herein and that on the 4th day of October, 1974, he served a true copy of the within appellants brief upon the following attorneys by depositing in an official depository under the exclusive care and custody of the United States Post Office Department, within the State of New York, enclosed in a post-paid, properly-addressed envelope.

Gerard M. Carey

Sworn to before me this
4th day of October, 1974

Diana E. Farrell
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